SERVED: July 16, 1998

NTSB Order No. EA-4681

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of June, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. JOHANNES VAN OVOST, Respondent.	Docket SE-14729

OPINION AND ORDER

Respondent, appearing pro se, appeals the oral initial decision of Administrative Law Judge William A. Pope, II, rendered at the conclusion of an evidentiary hearing held on September 9, 1997.[1] By that decision, the law judge affirmed the Administrator's finding that respondent

[1] An excerpt from the hearing transcript containing the law judge's initial decision is attached.

violated sections 39.3, 91.7(a) and 91.13(a) of the Federal Aviation Regulations ("FAR"), 14 CFR Parts 39 and 91, and affirmed the Administrator's suspension of all airman certificates held by respondent, including his airline transport pilot ("ATP") certificate, for 120 days.[2] We deny the appeal.

The initial decision includes a detailed recitation of the evidence, so only a brief summary of the relevant facts is necessary here. On February 27, 1995, Federal Aviation Administration Principal Maintenance Inspector Jon Strickland conducted a ramp inspection of N2559Z, a twin-

---

[2] FAR §§ 39.3, 91.7 and 91.13 provide, in relevant part, as follows:

> **§ 39.3 General.**
>
> No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive.
>
> **§ 91.7 Civil aircraft airworthiness.**
>
> (a) No person may operate a civil aircraft unless it is in an airworthy condition.
>
> * * * * *
>
> **§ 91.13 Careless or reckless operation.**
>
> (a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.
>
> * * * * *

engine Piper PA23-250 Aztec owned by respondent. In the course of that inspection, Inspector Strickland noticed in the cockpit a placard indicating that the aircraft's cabin heater was inoperative.[3] He informed respondent during his ramp inspection that the cockpit placard was insufficient, and that in order to operate the aircraft legally under Part 91 it was necessary to also deactivate the heater. See 91 C.F.R. § 213. He also told respondent about several methods by which the heater could be satisfactorily deactivated.

Inspector Strickland later reviewed AD 82-07-03 in detail and discovered that it requires the heater to be inspected every 100 hours of time in service, or every 24 months, whichever occurs first. The aircraft's logbook, however, indicated that the heater was last inspected pursuant to the AD on September 23, 1992.[4] After Inspector Strickland learned that respondent nonetheless operated N2559Z on March 5th and 6th, 1995, when the heater had not been deactivated or inspected as required -- and contrary to his discussion with respondent during the February 27, 1995, ramp inspection -- he initiated this enforcement action.

---

[3] Respondent and his mechanic were aware of maximum allowable intervals between inspections of the aircraft's Janitrol cabin heater, mandated by Airworthiness Directive ("AD") 82-07-03. The aircraft's logbook contains a May 18, 1994, entry indicating "cabin heater inoperative due to decay test due." Exhibit ("Ex.") A-1.

[4] The heater was ultimately inspected in compliance with AD 82-07-03 on March 6, 1995, subsequent to the flights that form the basis of the Administrator's complaint.

Respondent knew or should have known, after his discussion with Inspector Strickland, that the terms of the AD were material so long as the heater was not deactivated, and the AD clearly states that the required inspection is due every 100 hours or 24 months. Respondent also knew or should have known that during the relevant flights the heater was not in compliance with AD 82-07-03 because more than 24 months had elapsed since its last inspection. As Inspector Strickland testified, non-adherence to the AD rendered the aircraft unairworthy. See, e.g., Administrator v. Bailey and Avila, NTSB Order No. EA-4294 at 11 (1994) ("an aircraft is deemed 'airworthy' only when it conforms to its type certificate []if and as that certificate has been modified by . . . Airworthiness Directives"). Moreover, respondent's operation of an unairworthy aircraft supports a residual finding of carelessness or recklessness. See Administrator v. Rogers, NTSB Order No. EA-4428 at 5-6 (1996).[5]

Turning to respondent's appeal brief, respondent alleges various points of error by the law judge and, in the alternative, that his sanction is too severe. His arguments, however, are unavailing. First, he argues that

[5] The record thus supports the finding that respondent violated sections 91.7(a) and 91.13(a). It also appears that the law judge concluded that respondent operated the cabin heater -- a violation of section 39.3 -- and respondent did not offer contrary testimony.

because the Administrator did not provide him with a "list of citations to all cases" upon which she intended to rely at least fifteen days prior to the hearing, as instructed by the law judge's prehearing order, he was "ambushed."[6] We do not think the Administrator's non-adherence to the prehearing order was prejudicial, however, for the Administrator gave respondent timely notice of the essence of the relied-upon case law, and the law judge gave respondent the opportunity to use as much time as he felt he needed to review at the hearing copies of those cases ultimately supplied to him.[7] In short, we find no abuse of

---

[6] Respondent also argues that the Administrator violated the prehearing order by not submitting the material required for expert witnesses. The Administrator's sole witness, Mr. Strickland, however, never provided expert testimony, at least not any that was relevant to the resolution of this case. Evidence about the harm the AD was designed to prevent, whether respondent actually used the aircraft's heater during the flights at issue, or the substance of a new, replacement AD reissued after those flights -- even if, which we doubt, it be characterized as expert testimony -- simply does not pertain to a proper resolution of whether or not respondent violated FAR sections 91.7(a) or 91.13(a), or whether a 120-day suspension is an appropriate sanction.

[7] The Administrator's timely prehearing submission indicated, in part, that she:

> . . . intends to rely on the line of cases indicating noncompliance with ADs is a serious breach of an operator's obligation to comply with [FARs], renders aircraft unairworthy, can suggest a noncompliant attitude, and supports a suspension. . . .

In addition, during settlement discussions that took place well before the hearing and through counsel that then represented respondent, respondent was made aware of the

(continued . . .)

discretion in the law judge's procedural ruling.

Respondent also complains that the Administrator did not supply him with copies of Exhibits A-1 and A-2 at least fifteen days prior to the hearing, in contravention of the law judge's prehearing order. The Administrator's timely prehearing submission, however, notified respondent that "some or all of the Items of Proof included in the EIR in this case, including copies of the AD in issue[,]" might be offered into evidence. Moreover, the exhibits are merely photocopies of the respondent's aircraft logbook and records, and respondent therefore cannot claim that he was surprised or prejudiced by the introduction of those exhibits. Cf. Administrator v. Heisner and Diaz, 6 NTSB 733, 740-741 (1988). We also find no abuse of discretion in the law judge's decision to allow the Administrator to introduce the exhibits.

Turning to sanction, we find no reason to modify the 120-day suspension imposed by the Administrator.[8] The Administrator introduced the relevant portions of her

(continued . . .)

Administrator's sanction guidance table and, in light of the Administrator's counsel's claimed representations during those discussions, the 120-day suspension ultimately sought by the Administrator should not have surprised respondent.

[8] In our view, respondent's demonstrated non-compliance attitude is the most serious aspect of this case. See Administrator v. Erickson, NTSB Order No. EA-3735 at 6 (1992).

sanction guidance table into evidence and we note that, for each violation, it recommends a suspension of between 30 and 180 days for both "operation of an unairworthy aircraft" and "failure to comply with Airworthiness Directives." Ex. A-3. Thus, despite respondent's protestations to the contrary, a 120-day suspension is not inconsistent with precedent, and we therefore find no basis for concluding that the Administrator's choice of sanction was arbitrary or capricious. See, e.g., Administrator v. Reina, NTSB Order No. EA-4508 (1996), request for modification denied, NTSB Order No. EA-4552 (1997).[9]

[9] Respondent attached to his appeal brief a letter from a certified public accountant indicating the financial impact a 120-day suspension would have on respondent. Aside from the fact that this is new evidence, properly objected to by the Administrator, such considerations are not a proper basis for modifying an otherwise legitimate sanction. See, e.g., Administrator v. Mohumed, 6 NTSB 696, 700 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The 120-day suspension of respondent's airman certificates, including his ATP certificate, shall begin 30 days after the service date of this opinion and order.[10]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[10] For the purposes of this order, respondent must physically surrender his airman certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).